Supreme Court, U.S.
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No. 96-370

In The Supreme Court of the United States

October Term, 1996

Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund,
Petitioner,

v.

Ferbar Corporation of California, Inc.; Stephen Barnes,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1996
CERTIORARI GRANTED MAY 12, 1997

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

Order of the United States District Court for Northern California [Filed May 9, 1994]	6a
Opinion of the U.S. Court of Appeals for the Ninth Circuit	1a
Order Denying Rehearing and Rejecting Suggestion for Rehearing En Banc	20a

RELEVANT DOCKET ENTRIES

United States District Court
for the Northern District of California
Docket No. 93-CV-489

DATE	NO.	PROCEEDINGS
2/9/93	1	COMPLAINT (Summons(es) issued) Fee status pd entered on 2/9/93 in the amount of $120.00 (Receipt No. 27318) (fw) [Entry date 02/10/93]
3/23/93	3	ANSWER by defendant Ferbar Corp of CA, defendant Stephen J. Barnes to complaint [1-1] (fw) [Entry date 03/26/93]
10/27/93	10	NOTICE AND MOTION before Judge D. L. Jensen by defendant Ferbar Corp of CA, defendant Stephen J. Barnes for summary judgment with Notice set for 11/24/93 at 10:00 am (fw) [Entry date 10/28/93]
10/27/93	11	MEMORANDUM by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
10/27/93	12	STATEMENT of undisputed material facts by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
10/27/93	13	DECLARATION by Stephen J. Barnes on behalf of defendant Ferbar Corp of CA, defendant Stephen J. Barnes re motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
11/10/93	14	NOTICE AND CROSS-MOTION before Judge D. L. Jensen by plaintiff Bay Area Laundry& Dry for summary adjudication with Notice set for 11/24/93 at 10:00am [3:93-cv-00489] (fw) [Entry date 11/12/93]

DATE	NO.	PROCEEDINGS
11/10/93	15	MEMORANDUM by plaintiff Bay Area Laundry&Dry in opposition to motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	15	MEMORANDUM by plaintiff Bay Area Laundry&Dry in support of motion for summary adjudication [14-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	16	DECLARATION by Geoffrey V. White on behalf of plaintiff Bay Area Laundry&Dry re motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	17	STATEMENT of facts by plaintiff Bay Area Laundry&Dry in support of memorandum [15-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/17/93	18	REPLY by defendant Ferbar Corp of CA, defendant Stephen J. Barnes re motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/22/93]
12/22/93	20	MEMORANDUM by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]
12/22/93	21	MEMORANDUM by plaintiff Bay Area Laundry&Dry in support of motion for summary adjudication [14-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]
12/22/93	22	SUPPLEMENTAL DECLARATION by Geoffrey V. White on behalf of plaintiff Bay Area Laundry&Dry re memorandum [21-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]

DATE	NO.	PROCEEDINGS
5/9/94	25	ORDER by Judge D. L. Jensen granting defendants Ferbar Corporation and Stephen Barnes motion for summary judgment [10-1]; Partial judgment shall be entered accordingly. Status conference set for 8:30 5/25/94 ; All other dates currently scheduled are vacated. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
5/9/94	26	PARTIAL JUDGMENT: by Judge D. L. Jensen For reasons in Order filed 5/9/94, Court ENTERS PARTIAL JUDGMENT in favor of defendant Ferbar Corporation and against plaintiffs in this matter. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
5/9/94	27	PARTIAL JUDGMENT: by Judge D. L. Jensen For reasons stated in Order filed 5/9/94, Court ENTERS PARTIAL JUDGMENT in favor of defendant Stephen Barnes and against plaintiffs in this matter. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
6/3/94	29	ORDER by Judge D. L. Jensen dismissing party Robert J. Ferreira, party Diablo Cleaners, Inc, party Ferreira Farms, Inc. with prejudice , dismissing case (see Partial Summary Judgment re defendants Stephen Barnes and Ferbar Corporation- 5/9/94) (Date Entered: 6/6/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 06/06/94]
6/6/94	30	NOTICE OF APPEAL by plaintiff Bay Area Laundry&Dry from Dist. Court decision judgment [27-1], judgment [26-1] PAID 109826 [3:93-cv-00489] (fw)

United States Court of Appeals
for the Ninth Circuit
Docket No. 94-15976

DATE	PROCEEDINGS
6/9/94	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : yes. setting schedule as follows: CADS due 6/23/94 for Geoffrey White; appellant's designation of RT is due 6/16/94; appellee's designation of RT is due 6/27/94, , ; appellant shall order transcript by 7/6/94; court reporter shall file transcript in DC by 8/8/94 for Judith Dudeck; certificate of record shall be filed by 8/15/94 ; appellant's opening brief is due 9/22/94; appellees' brief is due 10/24/94, , ; appellants' reply brief is due 11/7/94; [94-15976] (vt)
11/16/95	ARGUED AND SUBMITTED TO William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT [94-15976] (mlm)
1/17/96	FILED PER CURIAM OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Published. William A. NORRIS, author; Robert R. BEEZER; Stephen S. TROTT, concurring.) FILED AND ENTERED JUDGMENT. [94-15976] (ot)
1/30/96	Filed original and 40 copies Appellant Bay Area Laundry petition for rehearing with suggestion for en banc 06 p.pages, served on 1/30/96 (PNL/ ACTIVE JDGS) [94-15976] (ot)
2/12/96	Filed order (William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT.) : Aple is directed to file a response to aplt's suggestion for rehearing en banc filed with this court on 1/30/96. In its response, aple should address aplt's argument that the decision in this case directly conflicts with the law of three other circuits. The response shall

DATE	PROCEEDINGS
	not exceed 15 pages, and shall be filed within 14 days of the date of this order. (phoned counsel) [94-15976] (em)
2/23/96	Filed Appellee Ferbar Corporation's response to petition rehearing and for suggestion for enbanc rehearing, served on 2/23/96 (PANEL & ACTIVE JDGES) [94-15976] (ot)
5/13/96	Filed order (William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT) : denying petition for rhrg and the suggestion for enbanc rehearing is rejected. [94-15976] (ot)
5/13/96	MANDATE ISSUED [94-15976] (mlm)

[Filed Feb. 9, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93 0489 DLJ

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Plaintiffs,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., A California corporation; FERREIRA FARMS, INC., A California corporation; DIABLO CLEANERS, INC., A California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA,
Defendants.

COMPLAINT FOR COLLECTION OF EMPLOYER WITHDRAWAL LIABILITY PAYMENTS

[ERISA Section 4301]

Plaintiffs allege:

1. This is an action by the Trustees of an employee pension benefit plan to collect withdrawal liability payments from an employer which has withdrawn from the Plan.

JURISDICTION

2. The jurisdiction of this Court is founded on Sections 4301 and 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") [29 U.S.C. Sections 1451, 1145].

3. This action arises under Sections 4219(c), 4221(b)(1) and 502(g)(2) of ERISA [29 U.S.C. Sec-

tions 1399(c), 1401(b)(1), and 1132(g)(2)] for violations of Section 515 of ERISA [29 U.S.C. Section 1145]

VENUE

4. Venue is proper under Section 4301(d) of ERISA [29 U.S.C. Section 1451(d)]. The BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND is administered in the Northern District of California. Defendants have their principal place of business in the Northern District of California.

PLAINTIFF

5. At all times herein mentioned, the BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND ("FUND") was and is an employee pension benefit plan within the meaning of Section 3(2) of ERISA [29 U.S.C. Section 1002(2)] established and maintained pursuant to several collective bargaining agreements between various employers engaged in commerce and AFL-CIO Laundry, Dry Cleaning, Government and Industrial Service Union Local 3 ("UNION"), an employee organization representing employees engaged in commerce, for the purpose of providing pension and related benefits to participants in the Fund and thier beneficiaries. The Fund is a multiemployer plan as defined in Sections 3(37) and 4001(a)(3) of ERISA [29 U.S.C. Sections 1002(37), 1301(a)(3)] and subject to and bound by the terms and provisions of ERISA, as provided in Section 4 thereof [29 U.S.C. Section 1003(a)]. The Board of Trustees of the Fund are the named fiduciaries of the Fund, and are authorized pursuant to Sections 4301(a)(1) and 502(g)(2) of ERISA [29 U.S.C. Sections 1451(a)(1) and 1132(g)(2)] to bring this action. The Fund, and the Pension Plan maintained thereunder, were established pursuant to an Agreement and Declaration of Trust as amended and restated effective July 1, 1974.

DEFENDANTS

6. Defendant FERBAR CORPORATION OF CALIFORNIA, INC. ("FERBAR") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Oakland, California.

7. Defendant FERREIRA FARMS, INC. ("FARMS") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Oakland. California.

8. Defendant DIABLO CLEANERS, INC. ("DIABLO") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Walnut Creek, California.

9. Defendant STEPHEN J. BARNES is, and at all times herein mentioned was a shareholder, officer and employee of Defendant FERBAR.

10. Defendant ROBERT J. FERREIRA is, and at all times herein mentioned was a shareholder, officer and employee of Defendant FERBAR, FARMS, and DIABLO, and each of them.

FIRST CLAIM

11. At all times material hereto, Defendant FERBAR was party to a collective bargaining agreement with the UNION which obligated FERBAR to contribute to the FUND on behalf of its covered employees.

12. On or about March, 1985, Defendant FERBAR completely withdrew as a contributing employer to the Fund by ceasing to have an obligation to contribute to the FUND pursuant to collective bargaining with the UNION.

13. By virtue of Defendant FERBAR's complete withdrawal from the Fund, Defendants FERBAR, FARMS, and DIABLO, and each of them, became liable to the

Fund for its withdrawal liability payments as determined in accordance with Section 4201 of ERISA [29 U.S.C. Section 1381].

14. On or about December 12, 1986, the Fund assessed a withdrawal liability against Defendant FERBAR in the amount of $45,570.80, and demanded payment in monthly installments of $345.50 for 240 months, plus a final payment of $344.96. Said notice and demand for payment of withdrawal liability fully conformed to applicable law and plan provisions. In accordance with Section 4219(c)(2) of ERISA [29 U.S.C. Section 1399(c)(2)], Defendant FERBAR was obligated to commence payment of its assessed withdrawal liability no later than February 1, 1987.

15. Defendant FERBAR requested review and arbitration of its withdrawal liability. No arbitration proceedings have been initiated pursuant to Section 4221 of ERISA [29 U.S.C. Section 1401].

16. At all times subsequent to February, 1987, Defendants FERBAR, FARMS, and DIABLO, and each of them, have failed and refused, and continue to fail and refuse to make the required installment payments of its withdrawal liability, or any of them, or to make a lump sum total payment thereof.

17. Defendant FERBAR has failed to cure its delinquency in payment of withdrawal liability and has defaulted in payment of such obligation. In accordance with Section 4219(c)(5) and 4221(d) of ERISA [29 U.S.C. Sections 1399(c)(5), 1401(d)], the total amount of outstanding withdrawal liability is now due and owing from Defendants in the sum of approimately $45,570.80, together with interest at the rate specified in ERISA Section 4219(c)(6) [29 U.S.C. Section 1399(c)(6)].

18. Plaintiffs have been required to retain the services of legal counsel to enforce payment of the amounts due and owing from Defendants and have incurred and will

incur reasonable attorneys' fees in amounts not yet ascertained.

SECOND CLAIM

19. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

20. Defendants, and each of them, constitute a group of businesses under common control and a single Employer within the meaning of Title IV of ERISA [29 U.S.C. Section 1301 *et seq.*]

21. By virtue of the facts set forth above, Defendants, and each of them, are jointly and severally liable for the amount of employer withdrawal liability assessed against FERBAR.

THIRD CLAIM

22. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

23. Defendant FERBAR is and at all times mentioned has been, the alter ego of, and a mere shell, instrumentality and conduit of Defendants BARNES and FERREIRA, in that said individual defendants transferred assets and liabilities to and from the corporation without adequate consideration and otherwise failed to maintain sufficient respect for the separate identity of FERBAR.

24. By virtue of the facts set forth above Defendant BARNES and FERREIRA are jointly and severally liable for the amount of employer withdrawal liability assessed against FERBAR.

FOURTH CLAIM

25. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

26. By reason of the foregoing, there is now due, owing and unpaid from Defendants to Plaintiffs the sum of approimately $25,375, being the amount of the de-

linquent monthly installment payments from February, 1987 to the date of filing of this action, and the sum of $345.50 each month thereafter. Plaintiffs will seek leave to amend this Complaint prior to trial to set forth the amount remaining unpaid.

27. Plaintiffs have suffered and will continue to suffer irreparable harm and injury unless Defendant FERBAR is preliminarily and permanently enjoined and required by Order of this Court to comply with its obligations under ERISA to make payments of its withdrawal liability as demanded by the FUND. Plaintiffs have suffered the loss of, and continue to lose investment income upon the monies owed by Defendants, adversely affecting the actuarial stability of the FUND and its ability to continue to pay benefits to participants. As all remaining contributing employers have withdrawn from the Plan, the Plan's only source of income presently is withdrawal liability payments. Unless Defendants are compelled to make installment payments as demanded, higher funding costs will be imposed on other withdrawn employers and the FUND will soon be insolvent.

28. Plaintiffs have no plain, speedy or adequate remedy at law and will be compelled to file a multiplicity of actions unless injunctive relief is granted herein.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

On the First, Second and Third Claims:

1. For unpaid withdrawal liability payments in the sum of approimately $45,570.80;

On the Fourth Claim:

2. For the sum of $25,375, and for such further sum as may be proved due, owing and unpaid at the time of trial;

3. For a preliminary and permanent injunction requiring Defendants to pay the FUND each and every monthly withdrawal liability payment in the sum of $345.

On All Claims:

4. For interest on said unpaid withdrawal liability payments from the date due until actually paid, at the rate prescribed under ERISA Section 4219(C)(6) [29 U.S.C. Section 1399(c)(6)];

5. For liquidated damages in an amount equal to said interest on unpaid withdrawal liability;

6. For reasonable attorneys' fees and costs in this action; and

7. For such other and further relief as the Court deems just and proper.

Dated: February 9, 1993

LAW OFFICES OF GEOFFREY V. WHITE

/s/ Geoffrey V. White
GEOFFREY V. WHITE
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

ANSWER TO COMPLAINT OF DEFENDANTS FERBAR CORPORATION OF CALIFORNIA INC. AND STEPHEN J. BARNES

COME NOW Defendants Ferbar Corporation of California, Inc. and Stephen J. Barnes (hereinafter sometimes referred to as "Defendants") and answer the Complaint on file herein.

1. ANSWERING PARAGRAPHS 1, 2, 3 AND 4 OF THE COMPLAINT, Defendants admit the allegations contained therein.

2. ANSWERING PARAGRAPHS 5, 7, 8 AND 10 OF THE COMPLAINT, Defendants lack sufficient information and belief to answer the allegations contained therein, and based on said lack of information and belief Defendants deny the allegations contained therein.

3. ANSWERING PARAGRAPH 6 OF THE COMPLAINT, Defendants deny the allegations contained therein. Defendants admit that Defendant Ferbar Corporation ("Ferbar") was and is a California corporation, and at one time was engaged in the dry cleaning business with its principal place of business in Oakland, but deny that it is currently engaged in the dry cleaning business or that its principal place of business is located in Oakland, California.

4. ANSWERING PARAGRAPH 9 OF THE COMPLAINT, Defendants admit that Stephen J. Barnes was

and is a shareholder and officer of Defendant Ferbar Corporation of California, Inc. and admit that he was an employee of Defendant Ferbar Corporation, but denies that he is an employee of Defendant Ferbar.

5. ANSWERING PARAGRAPHS 11, 12, 13 AND 17 OF THE COMPLAINT, Defendants deny each and every of the the allegations contained therein.

6. ANSWERING PARAGRAPH 14 OF THE COMPLAINT, Defendants deny each and every of the allegations contained therein. Defendants allege that on or about December 12, 1986 the Fund assessed a withdrawal liability against Superior French Laundry in the amount of $45,570.80, and that the Fund directed Superior French Laundry to commence payment of its assessed withdrawal liability no later than February 1, 1987.

7. ANSWERING PARAGRAPH 15 OF THE COMPLAINT, Defendants deny that Defendant Ferbar requested review and arbitration of its withdrawal liability, but allege that Superior French Laundry requested a review and arbitration of its assessed withdrawal liability. Defendants deny the allegation that no arbitration proceedings have been initiated pursuant to section 4221 of ERISA, and alleges that Superior French Laundry timely and properly initiated arbitration proceedings pursuant to section 4221 of ERISA.

8. ANSWERING PARAGRAPH 16 OF THE COMPLAINT, Defendants deny generally and singularly, each and every of the allegations contained therein. Defendants affirmatively admit that they failed and continued to fail to pay the February 1, 1987 and subsequent installment payments and to make a lump sum total payment.

9. ANSWERING PARAGRAPH 18 OF THE COMPLAINT, Defendants lack sufficient information and belief to answer the allegation contained therein and based

on said lack of information and belief, Defendants deny the allegations contained therein.

10. ANSWERING PARAGRAPH 19 OF THE COMPLAINT, Defendants incorporate by reference their answers to Paragraphs 1 through 18, inclusive.

11. ANSWERING PARAGRAPHS 20 AND 21 OF THE COMPLAINT, Defendants deny each and every allegation contained therein.

12. ANSWERING PARAGRAPH 22 OF THE COMPLAINT, Defendants incorporated by reference their answers to Paragraphs 1 through 18, inclusive.

13. ANSWERING PARAGRAPHS 23 AND 24 OF THE COMPLAINT, Defendants deny each and every allegation contained therein.

14. ANSWERING PARAGRAPH 25 OF THE COMPLAINT, Defendants incorporate by reference their answers to Paragraphs 1 through 18, inclusive.

15. ANSWERING PARAGRAPHS 26, 27 AND 28 OF THE COMPLAINT, Defendants deny and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. AS THEIR FIRST AFFIRMATIVE DEFENSE, Defendants allege that the Complaint and each claim for relief fails to state facts sufficient to constitute a claim for relief.

2. AS THEIR SECOND AFFIRMATIVE DEFENSE, Defendants allege that this action was filed in excess of the statute of limitations period set forth in 29 U.S.C. § 1451(f).

3. AS THEIR THIRD AFFIRMATIVE DEFENSE, Defendants allege that at no time did Defendants execute any written collective bargaining agreement with the

Laundry, Dry Cleaning, Government and Industrial Service Union Local 3, AFL-CIO.

4. AS THEIR FOURTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed to exhaust its administrative remedies.

5. AS THEIR FIFTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed and refused to participate in timely initiated arbitration proceedings related to any withdrawal liability in this matter.

6. AS THEIR SIXTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed to file this action as soon as it was practicable for it to do so.

7. AS THEIR SEVENTH AFFIRMATIVE DEFENSE, Defendants allege that any contributions made by Superior French Laundry or any Defendants were not required, and that they were not made under a collective bargaining agreement or as a result of a duty under applicable labor-management relations law.

8. AS THEIR EIGHTH AFFIRMATIVE DEFENSE, Defendants allege that any contributions made by Superior French Laundry or any Defendants to the Fund should not have been utilized in making a determination of withdrawal liability and no such liability should have been assessed.

9. AS THEIR NINTH AFFIRMATIVE DEFENSE, Defendants allege that the Fund was inaccurate in the manner in which it calculated the withdrawal liability, and that the Fund did not follow the steps set forth in the statute for the second alternative method of calculating withdrawal liability.

10. AS THEIR TENTH AFFIRMATIVE DEFENSE, Defendants allege that the amount of withdrawal liability was improperly calculated.

11. AS THEIR ELEVENTH AFFIRMATIVE DEFENSE, Defendants allege that the Fund did not utilize the proper statutory and regulatory method in calculating withdrawal liability following the merger of the Dry Cleaners and Laundry Workers Pension Trust Fund.

12. AS THEIR TWELFTH AFFIRMATIVE DEFENSE, Defendants allege that the improper purpose and effect of the merger of the Dry Cleaners and Laundry Workers Pension Trust Funds was to increase the unfunded vested benefits and concomitant withdrawal liability of employers in the Dry Cleaners Pension Fund.

13. AS THEIR THIRTEENTH AFFIRMATIVE DEFENSE, Defendants allege that the assumptions, actuarial and other information used in determining the unfunded and vested benefits and calculating the withdrawal liability was incorrect.

14. AS THEIR FOURTEENTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff did not follow the prescribed default and acceleration procedure.

WHEREFORE Defendants pray that:

1. Plaintiffs take nothing by this action.

2. Judgment be entered in favor of Defendants.

3. The Complaint be dismissed against Defendants.

4. Defendants be awarded their reasonable attorneys' fees.

5. Defendants be awarded their costs of suit herein.

6. The Court grant whatever further relief it deems just and proper.

DATED: March 23, 1993

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
Attorneys for Defendants
FERBAR CORPORATION OF
CALIFORNIA, INC. and
STEPHEN J. BARNES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Date: November 24, 1993

Defendant/Moving Parties' Alleged Undisputed Facts	*Supporting Evidence*
1. Ferbar Corporation owned three facilities: Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	Decl. of Stephen J. Barnes, p. 1:24-26.
2. Contributions were made by Ferbar to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities —Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	Decl. of Stephen J. Barnes, p. 1:26—p. 2:2.
3. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983.	Decl. of Stephen J. Barnes, p. 2:3-5.
4. On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government and Industrial Services Local No. 3.	Decl. of Stephen J. Barnes, p. 2:6-9.

Defendant/Moving Parties' Alleged Undisputed Facts	*Supporting Evidence*
5. Ferbar Corporation made no contributions to the Pension Trust Fund on behalf of employees working at Superior French Laundry or One Hour Martinizing commencing in March 1985 and thereafter.	Decl. of Stephen J. Barnes, p. 2:10-13.
6. Bay Area Laundry and Dry Cleaning Pension Fund sent a letter to Superior French Laundry dated December 12, 1986 establishing a monthly payment schedule for Superior French's withdrawal liability and notifying it that Superior French's first monthly withdrawal liability payment was due on February 1, 1987.	Decl. of Stephen J. Barnes, p. 2:16-21; Exh. A to Decl. of Stephen J. Barnes; Complaint, ¶ 14.
7. Neither Ferbar Corporation nor Superior French Laundry made any withdrawal liability payment to Bay Area Laundry and Dry Cleaning Pension Fund on or by February 1, 1987.	Decl. of Stephen J. Barnes, p. 3:1-3.
8. The Complaint in this action was filed on February 9, 1993.	Complaint on file with the Court.

DATED: October 19, 1993

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
Attorneys for Defendants
FERBAR CORPORATION OF CALIFORNIA, INC. and
STEPHEN J. BARNES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DECLARATION OF STEPHEN J. BARNES

Date: November 24, 1993

I, STEPHEN J. BARNES, declare that this declaration is given in support of Defendants' Motion For Summary Judgment, and that if I were called upon to testify, I could of my own knowledge testify to the following:

1. I am a shareholder in Defendant Ferbar Corporation. At one time, Ferbar made contributions to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities. Those facilities were Superior French Laundry, One Hour Martinizing and Diablo Cleaners.

2. In 1983, Ferbar ceased making contributions on behalf of employees working at Diablo Cleaners, as Diablo was no longer owned by Ferbar at that point.

3. On March 1, 1985, employees working at Superior French Laundry and One Hour Martinizing submitted a petition to me indicating that they no longer wanted to be represented by AFL-CIO Laundry Dry Cleaning, Government and Industrial Services Local No. 3. After receipt of that petition, Ferbar ceased to make contributions to the Pension Trust Fund on behalf of employees of Superior French Laundry and One Hour Martinizing commencing in March, 1985, and made no contributions thereafter. If Ferbar had any obligation to

contribute to the Pension Trust Fund, it no longer existed starting in March 1985.

4. By letter dated December 12, 1986, Plaintiff Trust Fund sent notice to Superior French Laundry that it had a withdrawal liability obligation to the Pension Fund, and established a monthly payment schedule for it with the first payment due on February 1, 1987. A copy of said notice which I received is attached hereto marked Exhibit A.

5. Neither Ferbar nor Superior French Laundry made any withdrawal liability payments to the Pension Fund on or by February 1, 1987 or at any time thereafter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Carlos, California on October 15, 1993.

/s/ Stephen J. Barnes
STEPHEN J. BARNES

[EXHIBIT A]

BAY AREA LAUNDRY AND DRY CLEANING PENSION FUND
Glen Slaughter & Associates, Administrator
1999 Harrison Street, Suite 500
Oakland, California 94612
Telephone (415) 451-8564

December 12, 1986

- Superior French Laundry
- Stephen Barnes
- 1284 W Grand Ave
- Oakland, CA 94607

RE: *Withdrawal Liability Assessment and Demand for Payment*
Account Number(s): 0912270

Gentlemen:

Our records indicate that you have not contributed to the Bay Area Laundry and Dry Cleaning Pension Fund since March 1985.

Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

This statute, as you probably know, provides that when an employer withdraws from participation in a multiemployer pension plan, the withdrawing employer is obligated to the Plan for a portion of the Plan's unfunded vested benefit liabilities as of the end of the Plan Year immediately preceding the date of the employer's withdrawal.

Pursuant to the provisions of this statute and to the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees in the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to you. These calculations are summarized on the attached forms and indicate a lump sum withdrawal liability assessment amount of $45,570.80.

You may pay the withdrawal liability set forth in the preceding paragraph by a single lump sum payment within 60 days after your receipt of this letter.

The Act also permits a schedule of payments as an option to the lump sum payment. Under the optional schedule, your first payment of $345.50 for 240 months is due on February 1, 1987, with a final payment of $344.96. Payments are due on the first of each month.

The attached worksheet and exhibit illustrate the calculation of both the lump sum payment and optional schedule.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received.

Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plan's Trust Agreement; and, your obligation may be subject to such additional steps as the Trustees may require in accordance with the law.

More importantly, should you fail to pay any monthly payment plus interest within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan deems to constitute a "default" in your payment obligations, ERISA, as amended, provides that the Board of Trustees may deem you to be in default and thereby liable for immediate payment of the outstanding amount of your withdrawal liability from the due date of the first payment which was not timely made. If the Plan has to sue to collect withdrawal liability, the Act requires the Court to award to the Plan its costs, attorneys fees, interest and liquidated damages.

Within ninety (90) days from the date you receive this notice, you may:

(1) Request the Trustees to review any specific matter relating to the determination of your company's liability and payment schedule;

(2) Identify to the Trustees any claimed inaccuracy; and

(3) Furnish the Trustees with any additional relevant information.

The Plan will review any matter raised by you, and you will subsequently be notified of the Plan's decision, the basis for the decision, and the reason for any change in the determination of your liability or your schedule to liability payments. *You are required by the Act to make the payments set forth in this letter notwithstanding any request for review or appeal of the determination of the amount of your liability or the schedule of payments.* Any adjustments to your liability will be reflected in your future payments.

This letter is intended to provide you with notice of your liability and payment obligations and of the existence of ERISA, as amended, and of some of its provisions. This letter is not intended as an explanation of the statute, nor shall it be construed as limiting in any way the rights of the Plan under the statute.

Sincerely,

BOARD OF TRUSTEES

Encl.: Withdrawal Liability Calculations

cc: All Trustees
Legal Counsel
Actuary

[Filed Nov. 10, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DECLARATION OF GEOFFREY V. WHITE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS CROSS-MOTION FOR SUMMARY ADJUDICATION

Date: November 24, 1993

I, GEOFFREY V. WHITE, declare as follows:

1. I am the attorney for Plaintiffs, BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, in the above-captioned matter. I have been the attorney for the Trust Fund since 1975. I make this Declaration in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment herein, and for Plaintiffs' Cross-Motion for Summary Adjudication of Defendants' claim the Complaint is barred by the applicable statute of limitations under ERISA.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Withdrawal Liability Assessment and Demand for Payment, dated December 12, 1986 from the Fund addressed to Superior French Laundry and Defendants Stephen J. Barnes. That notice informed Defendants that they had withdrawn from the Fund by ceasing to make contributions on and after March, 1985, that the Fund had calculated Defendants' withdrawal liability in the sum

of $45,570.80, and that Defendants could either pay the withdrawal liability in a single lump sum payment within sixty (60) days after receipt of that demand, or pay the withdrawal liability in monthly payments commencing February 1, 1987. Further, the Assessment informed Defendants that failure to pay any installment by the due date would incur liability for interest and liquidated damages, and any subsequent failure to pay within sixty (60) days after receiving written notice that such payment was delinquent would constitute a default in accordance with ERISA and the regulations promulgated by the Pension Benefit Guaranty Corporation.

3. On or about February 27, 1987, Superior French Laundry submitted its Request for Review of the withdrawal liability assessment. Attached hereto as Exhibit 2 is a true and correct copy of that letter. As indicated in the Request for Review, the Employer challenged the Fund's calculations of its withdrawal liability and denied that it had any obligation to contribute to the Fund, even though it had done so for many years, because it had allegedly never signed a collective bargaining agreement.

4. On or about April 14, 1987, the Fund mailed to Superior French Laundry a Notice of Delinquency in payment of its withdrawal liability assessment. A true and correct copy of that letter is attached hereto as Exhibit 3. As stated in the Notice of Delinquency,

> That letter [the withdrawal liability Assessment] informed you of your monetary obligations as a Withdrawn Employer under ERISA and provided you with two options for payment: (1) payment of the entire lump sum within sixty (60) days or, (2) Payment of the first installment on a series of payments within sixty (60) days.

The letter continued by stating that since more than sixty days had elapsed without any payment from the Em-

ployer, it was now considered delinquent, and would be considered in default of its obligations to pay withdrawal liability unless the delinquency was cured within sixty days of the date of the Notice of Delinquency.

5. On or about July 8, 1987, Superior French Laundry submitted its Notice of Initiation of Arbitration in response to the Fund's assessment of withdrawal liability. Attached hereto as Exhibit 4 is a true and correct copy of that Notice. Although the Employer provided this notice of its intent to proceed to arbitration of its disputed withdrawal liability, no arbitration proceedings have yet commenced. As indicated therein, a copy of the initial Assessment and demand for payment was attached thereto as Exhibit A, and a copy of the Employers Request for Review was attached as Exhibit B.

6. In accordance with the Multi-Employer Pension Plan Amendments Act, which amended ERISA to provide for calculation and payment of Employer withdrawal liability, the Fund Trustes adopted rules and regulations pertaining to employer withdrawal liability under the Pension Plan in October, 1981. These rules and regulations were subsequently amended on October 23, 1986. Attached hereto as Exhibit 5 is a true and correct copy of these rules and regulations as adopted by the Trustees. As stated in Section 5(b) of these Rules,

> Withdrawal liability shall be payable monthly, according to the schedule determined by the Trustees. Payment of withdrawal liability shall commence no later than sixty days after demand is made therefore by the Trustees.

As further stated in Section 5(b),

> Failure to make any payment when due causes the Employer to be additionally liable for interest, and the Employer will be considered in default if the failure to make payment is not cured within sixty

days after the Employer receives notice of its delinquency.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on November 10, 1993 at San Francisco, California.

/s/ Geoffrey V. White
GEOFFREY V. WHITE

(Exhibit 1 Omitted)

[EXHIBIT 2]

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
Attorneys at Law
650 California Street, 20th Floor
San Francisco, California 94108-2693
(415) 433-1940

February 27, 1987

CERTIFIED/RETURN
RECEIPT REQUESTED

Board of Trustees
Bay Area Laundry and Drycleaning
Pension Fund
1999 Harrison Street, Suite 500
P.O. Box 24263

Oakland, California 94623-1263

Re: *Superior French Laundry/Account No. 0912270*

Dear Members of the Board:

Pursuant to section 4219 of the Multi-Employer Pension Plan Amendments Act, the Employer, Superior French Laundry, hereby submits this request for review of the withdrawal liability of which you gave notice by letter of December 12, 1986 which was received by the Employer on or about December 15, 1986.

The Employer wishes to have the Trustees review their determination of withdrawal liability as it believes no liability may be imposed on it for the reasons set forth herein. It also will identify to the Trustees what it believes to be are inaccuracies in the Trustees' calculation of the withdrawal liability.

Under the second alternative method authorized by the Act and which we believe was utilized by the Fund in

determining withdrawal liability, the Fund is to take into account the "total amount required to be contributed by the employer under the plan for the last five plan years ending before the withdrawal." MPPA Section 4211(c)(3)(B)(i).[1] Section 4212 defines "obligation to contribute" as "an obligation to contribute arising—(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions."

Although the Employer herein did make contributions to the Pension Fund, those contributions were not required in that they were not made under a collective bargaining agreement or as a result of a duty under applicable labor-management relations law. The Employer never signed any collective bargaining agreement with Laundry, Drycleaning and Industrial Service Local 3, AFL-CIO or with any other union local. Neither was any trust agreement ever signed by the Employer. Under 29 U.S.C. § 186(c)(5)(B), it is unlawful for an employer to pay or agree to pay money to a respresentative of his employees except where the detailed basis on which such payments are to be made is specified in a written agreement with the employer. Unless there is a written agreement upon which the requirement to contribute is based, the Fund would be in violation of 29 U.S.C. § 186 if it demanded and collected pension contributions. See *Moglia* v. *Geoghegan*, 403 F.2d 110 (2nd Cir. 1968), *cert. denied*, 349 U.S. 919 (1969). As the Employer here is not bound by any collective bargaining agreement and as no provision of labor-management relations law could re-

[1] If another method of calculation was used the Employer's position would be the same, as the other methods prescribed by Congress also utilize amounts that the Employer was obligated or required to contribute.

quire trust fund contributions in the absence of a writing,[2] the Employer was not required or obligated to make any contributions. Hence, any contributions made by it should not have been utilized in making a determination of withdrawal liability and no such liability should have been assessed.

Moreover, the Employer believes that the Fund was inaccurate in the manner in which it calculated the withdrawal liability in that the Fund did not follow the steps set forth in the statute for the second presumptive method. It does not appear that the value (as of the end of 1984) of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers withdrawing before 1984 was subtracted from the amount of the plan's UVB's as of the end of 1984 as required under section 4211(c)(3). Section 4211 also requires utilization only of the total contributions for all employers during the last five plan years preceding the withdrawal. This amount is to be increased by employer contributions owed for earlier periods that were collected in those five years and decreased by amounts contributed by employers who withdrew under the law's withdrawal provisions during those five years. Under Step 2 of your summary of the withdrawal liability calculation you speak of total contributions of all employees adjusted for withdrawals before 1984. It appears that the Fund may have taken into account contributions of employers prior to 1980 and that it did not make the appropriate increases and decreases referred to in the section. If that was the case, the calculations should be completely revised.

Finally, the Employer does not believe that the Fund utilized the proper statutory or regulatory methods in calculating withdrawal liability following the merger of the

[2] We are not dealing with a situation where a contract has expired but an exmployer is required to continue making contributions because no impasse has been reached. Here there was never a written contract in the first place.

Drycleaners and the Laundry Workers Pension Trust Funds. It believes that the improper purpose and effect of the merger was to increase the unfunded vested benefits and concomitant withdrawal liability of employers in the dry cleaners pension fund. It does not believe that the assumptions, actuarial and other information used in determining the unfunded vested benefits and calculating the withdrawal liability was correct.

The Employer hereby requests that the Trustees review their determination of Superior French Laundry's withdrawal liability and withdraw their notice of withdrawal liability assessment. In the alternative, it specifically requests that the Fund provide it with a copy of its rules on withdrawal liability, a copy of the documents pertaining to the Pension Plan mergers and a detailed report of all calculations it made and the assumptions and information utilized in determining the unfunded vested benefits and the Employer's withdrawal liability.

Very truly yours,

/s/ William F. Terheyden
WILLIAM F. TERHEYDEN

WFT:gmd

bcc: Steve Barnes

[EXHIBIT 3]

BAY AREA LAUNDRY AND
DRY CLEANING PENSION FUND
Glen Slaughter & Associates, Administrator
1999 Harrison Street, Suite 500
Oakland, California 94612
Telephone (415) 451-8564

April 14, 1987

- Superior French Laundry
- Stephen Barnes
- 1284 W. Grand Avenue
  Oakland, CA 94607

RE: Withdrawal Liability Assessment and Demand for Payment Account Number(s):

Gentlemen:

You have received a Withdrawal Liability Assessment letter from this office under date of December 12, 1986.

That letter informed you of your monetary obligations as a Withdrawn Employer under ERISA and provided you with two options for payment: (1) Payment of the entire lump sum within 60 days or, (2) Payment of the first installment on a series of payments within 60 days.

Since more than 60 days has elapsed from the date of the Withdrawal Liability Assessment Letter and we have no response from you, it is our obligation to inform you of your status as a Delinquent Withdrawn Employer under ERISA and as such, additional assessments are now due. You are required to contact this office within 10 days of the date of this letter to avoid forced collection.

MOST IMPORTANTLY, FAILURE TO MAKE THE NECESSARY PAYMENT WITHIN 60 DAYS OF THE DATE OF THIS LETTER WILL CAUSE YOU TO

BECOME A DEFAULTED WITHDRAWN EMPLOYER UNDER ERISA WHICH PERMITS THE BOARD OF TRUSTEES WITHIN THE ACT TO INSIST UPON IMMEDIATE PAYMENT OF THE ENTIRE OUTSTANDING AMOUNT OF YOUR WITHDRAWAL LIABILITY. You are required by ERISA to make the necessary payments notwithstanding any request you may make for review or appeal of the determination of the amount of your liability or schedule of payments. Any adjustments to your liability will be reflected in future payments. If legal action is required to collect Withdrawal Liability, ERISA requires the court to award to the Plan its costs, attorney fees, interest and liquidated damages.

Sincerely,

GLEN SLAUGHTER & ASSOCIATES
Administrator

cc: Collection Agent
Delinquency Committee
All Trustees
Legal Counsel

[EXHIBIT 4]

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
Attorneys at Law
650 California Street, 20th Floor
San Francisco, California 94108-2693
(415) 433-1940

July 8, 1987

CERTIFIED/RETURN
RECEIPT REQUESTED

Bay Area Laundry and Drycleaning
Pension Fund
P.O. Box 24263
Oakland, California 94623-1263

ATTENTION: GLEN SLAUGHTER & ASSOCIATES

Re: Superior French Laundry
Account No. 0912270

Dear Mr. Slaughter:

Please find enclosed the Notice of Initiation of Arbitration submitted by Superior French Laundry. Please contact me so that we may begin the process of selecting an arbitrator.

Very truly yours,

/s/ William F. Terheyden
WILLIAM F. TERHEYDEN

WFT:gmd
Enclosure

cc: Stephen Barnes (w/enc.)

NOTICE OF INITIATION OF ARBITRATION

Pursuant to the regulations of the Pension Benefit Guaranty Corporation (29 C.F.R. § 2641.2) the Employer, Superior French Laundry (Account No. 0912270), hereby initiates arbitration of a withdrawal liability dispute that it has with the Bay Area Laundry and Drycleaning Pension Fund and its Trustees.

1. On December 12, 1986, the Bay Area Laundry and Drycleaning Pension Fund sent a withdrawal liability assessment and demand for payment which is attached hereto marked Exhibit A.

2. On February 27, 1987, Superior French Laundry made a request for review pursuant to Section 4219 of the Multi-Employer Pension Plan Amendments Act of the withdrawal liability assessed by the Fund. A copy of that request for review is attached hereto marked Exhibit B. Said request for review was received by the Fund on March 3, 1987.

3. The Employer received no response from the Pension Fund to its request for review.

4. The Employer disputes the Plan sponsor's determination of its withdrawal liability and is hereby initating arbitration of the dispute. It includes in its dispute and seeks to arbitrate all of the issues raised in its request for review dated February 27, 1987.

DATED: July 8, 1987

Respectfully submitted,

LITTLER, MENDELSON,
FASTIFF & TICHY

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
A Professional Corporation

Attorneys for Superior
French Laundry

[EXHIBIT 5]

BAY AREA DRY CLEANERS AND LAUNDRY WORKERS PENSION PLANS

AMENDMENT NO. 1

to the
RULES AND REGULATIONS PERTAINING TO EMPLOYER WITHDRAWAL LIABILITY

Effective June 25, 1986, Appendix III, Section 5(d) shall be amended and a new subsection (e) added, as follows:

> "(d) In the event that an Employer fails to make any payment when due, interest at a rate determined by the Trustees in accordance with PBGC regulations, shall accrue on the payment from the due date until the date the payment is made.
>
> (e) An Employer shall be considered in default if failure to make any payment is not cured within 60 days after the Employer receives written notice from the Trustees of such delinquency. An Employer shall also be considered in default immediately upon the filing of any petition in bankruptcy, for reorganization or arrangement, the making of any general assignment for benefit of creditors or bulk sale of assets, or upon insolvency. In the event of default, the outstanding amount of the Employer's withdrawal liability shall immediately become due and payable, together with accrued interest on the total outstanding liability from the due date of the first untimely payment, or the date of default, whichever is earlier."

The undersigned hereby certify that the above Amendment to the Pension Plan was duly adopted by the Board of Trustees at a meeting held on October 23, 1986.

/s/ Rosie M. Carr
Chair

/s/ Jim P. Pettersen
Secretary

BAY AREA DRY CLEANERS AND LAUNDRY WORKERS PENSION PLAN

APPENDIX III
RULES AND REGULATIONS PERTAINING TO EMPLOYER WITHDRAWAL LIABILITY

Section 1. Preamble

This Appendix III to the Bay Area Dry Cleaners and Laundry Workers Pension Plan sets forth rules and regulations applicable to the determination and payment of Employer withdrawal Liability as established under the Multiemployer Pension Plan Amendment Act of 1980 (the Act). These rules and regulations shall apply to complete or partial withdrawals, as defined in the Act, occurring after April 28, 1980. The relevant provisions of the Act shall apply to any matter affecting an Employer's withdrawal liability to the extent that such matter is not addressed in this Appendix III.

Section 2. Calculation of Withdrawal Liability

The amount of the unfunded vested benefits allocable to an Employee under this Section is the product of

(a) the Plan's unfunded vested benefits as of the end of the Plan Year preceding the Plan Year in which the Employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from Employers withdrawing before such year; multiplied by

(b) a fraction

(1) the numerator of which is the total amount required to be contributed by the Employer under the Plan for the last 5 Plan years ending before the withdrawal, and

(2) the denominator of which is the total amount contributed under the Plan by all Employers for the last 5 Plan Years ending before the withdrawal, increased by Employer Contributions owed with respect to earlier periods which were collected in those Plan Years, and decreased by any amount contributed to the Plan during those Plan Years by Employers who withdrew from the Plan under this Appendix during those Plan Years.

Section 3. Special Rules with respect to Employer Contributions.

For purposes of this Appendix III, Employer Contributions will be considered "made", and amounts will be considered "contributed" for a Plan Year if they are made on account of employment rendered in such Plan Year provided such Employer Contributions and amounts are paid to the Plan on or before the cut-off date used by the independent qualified public accountant engaged by the Trustees pursuant to section 103(a)(3) of ERISA in determining the total Employer Contribution to be reported on the Plan's Form 5500 for the Plan Year. Contributions and amounts paid to the Plan after such cut-off date will be considered made and contributed for the Plan Year in which they are paid.

Section 4. Actuarial Assumptions.

The actuarial assumptions which shall be used by the Plan's enrolled actuary in determining the unfunded vested benefits of the Plan for purposes of withdrawal liability shall be the same as those used for purposes of determining the Plan's compliance with the minimum funding standards of section 412 of the Internal Revenue Code.

Section 5. Payment of Withdrawal Liabiilty.

(a) Amount of payment

(1) Except as provided in (2) and (4) below, and in (c) and (d) below; an Employer shall pay the amount determined under Section 2 (appropriately adjusted for partial withdrawal as provided in Section 4206 of ERISA and de minimis reductions as provided in Section 2(c) of this Appendix and in Section 4209 of ERISA,) over the period of years necessary to amortize the amount in level annual payments determined under (3) below, calculated as if the first payment were made on the first day of the Plan Year following the Plan Year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent Plan Year. Such amortization period shall be determined based on actuarial assumptions used in the most recent actuarial valuation of the Plan.

(2) In any case in which the amortization period described in (1) above exceeds 20 years, the Employer's liability shall be limited to the first 20 annual payments determined in (3) below.

(3) Except as provided in (5) below, the amount of each annual payment shall be the product of

(A) the average number of Covered Hours for the three consecutive Plan Years, during the 10 consecutive Plan Years ending before the date of withdrawal, in which the Employer had an obligation to contribute for the greatest number of Covered Hours, and

(B) The highest contribution paid at which the Employer had an obligation to contribute under the Plan during the 10 Plan Years ending with the Plan Year in which the withdrawal occurs.

(C) For purpose of (A) and (B) above, if an Employer withdraws in a Plan Year ending before January 1, 1985, the appropriate number from the following shall be substituted for the number "10" each time such number appears.

If the Employer withdraws in the Plan Year ending	Then the number substituted is
December 31, 1980	5
December 31, 1981	6
December 31, 1982	7
December 31, 1983	8
December 31, 1984	9

(4) In the case of a withdrawal of all or substantially all Employers under the Plan, as described in Section 4219(c)(1)(D) of ERISA, (2) above shall not apply, and total unfunded vested benefits shall be allocated among all such Employers according to regulations established by the Pension Benefit Guaranty Corporation (PBGC).

(5) As described in Section 4219(c)(1)(E) of ERISA, the amount of annual payment may be adjusted in the event of a partial withdrawal.

(b) Withdrawal liability shall be payable monthly, according to the Schedule determined by the

Trustees. Payment of withdrawal liability shall commence no later than 60 days after demand is made therefor by the Trustees.

(c) An Employer shall be entitled to prepay his withdrawal liability and accrued interest without penalty.

(d) In the event that an Employer fails to make any payment when due, interest, at a rate determined by the Trustees in accordance with PBGC regulations, shall accrue on the payment from the due date until the date the payment is made. An Employer shall be considered in default if such failure to make any payment is not cured within 60 days after the Employer receives notice from the Trustees of such failure. In the event of a defualt, the outstanding amount of the withdrawal liability shall immediately become due and payable.

[Filed Nov. 10, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

PLAINTIFFS' COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS

Date: November 24, 1993

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
	Admitted [1]
1. Ferbar Corporation owned three facilities: Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	
2. Contributions were made by Ferbar to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities —Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	*Admitted.*
3. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983.	*Admitted.*

---

[1] Where indicated, we have admitted the corresponding statement of fact as set forth in Defendants' Statement herein.

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
4. On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government and Industrial Services Local No. 3.	*Admitted.*
5. Ferbar Corporation made no contributions to the Pension Trust Fund on behalf of Employees working at Superior French Laundry or One Hour Martinizing commencing in March 1985 and thereafter.	*Admitted.*
6. Bay Area Laundry and Dry Cleaning Pension Fund sent a letter to Superior French Laundry dated December 12, 1986 establishing a monthly payment schedule for Superior French's withdrawal liability and notifying it that Superior French's first monthly withdrawal liability payment was due on February 1, 1987.	*Admitted.* Decl. of Geoffrey V. White, Exh. 1.
7. Neither Ferbar Corporation nor Superior French Laundry made any withdrawal liability payment to Bay Area Laundry and Dry Cleaning Pension Fund on or by February 1, 1987.	*Admitted.*
8. Superior French Laundry submitted a Request for Review of its assessed withdrawl liability by the Fund Trustees by letter of February 27, 1987.	Decl. of Geoffrey V. White at p. 2; Exhibit 2.

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
9. The Fund notified Superior French Laundry that it was delinquent in payment of its assessed withdrawal liability by letter of April 14, 1987. Neither Ferbar Corporation nor Superior French Laundry have made any payment of withdrawal liability to the present date.	Decl. of Geoffrey V. White at pp. 2-3; Exhibit 3.
10. Superior French Laundry submitted a Notice of Initiation of Arbitration concerning its disputed withdrawal liability by letter of July 8, 1987. No arbitration proceedings have yet been held.	Decl. of Geoffrey V. White at p. 3; Exhibit 4.
11. The Complaint in this action was filed on February 9, 1993.	*Admitted.*

Respectfully submitted,

LAW OFFICE OF GEOFFREY V. WHITE

/s/ Geoffrey V. White
GEOFFREY V. WHITE
Attorney for Plaintiffs

Dated: November 10, 1993